81-2401

No. .....

Office - Supreme Court, U.S.
FILED
JUL 1 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 19____

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,
Petitioners,

v.

FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas; JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, as Attorneys,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

GLENN O. YOUNG, *pro se*
P. O. Box 1086
Sapulpa, Oklahoma 74066
(918) 224-3131
Attorney for Petitioners

July, 1982

QUESTION PRESENTED

In affirming a Judgment of the United States District Court for the Northern District of Oklahoma, which overruled Appellants' Motion to Remand, the Tenth Circuit disregarded limitations imposed by Congress on jurisdiction of the United States District Court for the Northern District of Oklahoma.

The Judgment affirmed constituted a breach of Oklahoma Constitution and Statutes and Acts of the United States Congress vesting authority in Oklahoma courts.*

The usurpation of authority by the United States District Court for the Northern District of Oklahoma violates the rules of this Court unanimously announced in *Kelleam* v. *Maryland Casualty Company*, 312 U.S. 377-382, 85 L.Ed. 899, an opinion by the late Justice William O. Douglas.

---

* See Appendices hereto.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED 1

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 11

APPENDIX "A" —
Slip Opinion of the U. S. Court of Appeals for the Tenth Circuit

APPENDIX "B" —
Petition for Rehearing Denied (10th Cir.)

APPENDIX "C" —
Order and Judgment for Attorneys' Fees

APPENDIX "D" —
Order Overruling Plaintiffs' Motion for New Trial and Motion to Reconsider; and awarding Attorneys' Fees to Fidelity Union Life Insurance Company

APPENDIX "E" —
Judgment entered in favor of Defendant, Fidelity Union Life Insurance Company

TABLE OF CONTENTS CONTINUED PAGE(S)

APPENDIX "F" —

Removal Petition and Removal Bond by Defendants, Case No. C-79-301

APPENDIX "G" —

Petition for Removal by Defendant, Case No. 76-C-30

APPENDIX "H" —

Plaintiffs' Withdrawal of Dismissal and Motion to Remand

APPENDIX "I" —

Page 3 of Appellants' Brief in the U. S. Court of Appeals (10th Cir.), dated November, 1980

TABLE OF AUTHORITIES

Cases PAGE(S)

Basso v. *Utah Power & Light Co.*, 495 F.2d 906 (10th Cir. 1974) 8

Caffery v. *New York Central Railroad Co.*, 324 F.2d 711 (2d Cir. 1963) 7

Denny v. *Pironi*, 141 U.S. 121, 11 S.Ct. 966, 35 L.Ed. 657 (1891) 7

Jabubowski v. *Central Railroad Co.*, 88 F.Supp. 258 (D.C. N.Y. 1950) 8

Johnson v. *Christian*, 125 U.S. 642, 8 S.Ct. 989, 31 L.Ed. 820 (1888) 7

Kelleam v. *Maryland Casualty Company*, 312 U.S. 377, 85 L.Ed. 899 6

Mullendore v. *American Surety Co.*, 27 F.2d 572 (9th Cir. 1928), *cert. den.* 278 U.S. 653, 49 S.Ct. 178, 73 L.Ed. 563 7

Sessions v. *Chrysler Corp.*, 517 F.2d 759 (9th Cir. 1975) 7

Statutes and Codes

28 U.S.C. §1332 2-3
28 U.S.C. §1441 3
28 U.S.C. §1254 2

12 OKLA.STAT. §1031 4

No. .....

In the
Supreme Court of the United States

OCTOBER TERM, 19____

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,
Petitioners,

v.

FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas; JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, as Attorneys,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a Writ of Certiorari issue to the United States Court of Appeals for the Tenth Circuit to review the judgment of said court entered in the above styled case on the 23rd day of March, 1982, and Order Denying Rehearing entered the 22nd day of April, 1982.

OPINIONS BELOW

The Slip Opinion of said court (not for official publication) is printed as Appendix "A" hereto. The Order of the District Court for the Northern District of Oklahoma is printed as Appendix "D" hereto. The Journal Entry of Judgment of the United States District Court is printed as Appendix "E" hereto. The Order of the United States Court of Appeals Denying Petition for Rehearing appears as Appendix "B" hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254, which, in pertinent parts, reads:

> "§ 1254. *Courts of appeals; certiorari; appeal; certified questions*
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

STATUTES INVOLVED

The Statutes of the United States (Title 28, U.S.C.) vesting District Courts with jurisdiction, so far as pertinent, read:

> "§ 1332. *Diversity of citizenship; amount in controversy; costs*
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

* * * *

(c) For the purposes of this section and section 1441 of this title [28 USCS § 1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

"§ 1441. *Actions removable generally*

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division enbracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. *Any other action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.*" (italics added)

STATEMENT OF THE CASE

Upon reaching his majority, Ulrich Waldemar Young, joined by his brother, Norbert, his mother, Charlotte, and his father, Glenn O., in person and as Administrator of the Estate of Thomas Alexander Young, on September 14, 1979, filed in the District Court of Creek County, Oklahoma as specifically authorized by the Statutes of the State,[1] an action for damages, court costs and attorney fees against Fidelity Union Life Insurance Company, James M. Sturdivant, Gable, Gotwals, Rubin, Fox, Johnson & Baker, and Glen Rinehart, as its attorneys and agent. No appearance was ever made or service attempted on Rinehart. He did not petition for removal and by reason thereof is not a party to this suit.

On October 5, 1979, Elsie Draper, appearing only for the defendants, Fidelity and its Oklahoma attorneys, filed a Petition for Removal[2] of this suit to the United States District Court for the Northern District of Oklahoma.[3] She served upon plaintiffs' attorney Notice of Removal of said action in behalf only of the same litigants. Grounds asserted for removal were alleged to be fraudulent joinder of Fidelity's Oklahoma attorneys to defeat federal jurisdiction. Since Fidelity and its attorneys and plaintiffs were all for the purpose of this suit Oklahoma citizens, whether they were fraudulently joined or not was immaterial to the case.

---

[1] 12 O.S. §1031.

[2] See Appendix "F" hereto.

[3] See Appendix "G" hereto.

On November 6, 1979, plaintiffs filed their Motion to Remand alleging lack of jurisdiction in said United States District Court.[4]

On May 5, 1982, following hearing in which the question of federal jurisdiction on the ground of fraudulent joinder was, by the court, considered, the Motion to Remand was overruled. The case proceeded to trial on defendants' Motion for Summary Judgment alleging, inter alia, *res judicata.*

The case alleged to be *res judicata* was void upon the face of the record for want of diversity of citizenship. (See Petition for Removal, Appendix "G" hereto.)

On August 18, 1980, Judgment was entered for the defendants and for costs in the amount of $5,165.00. Alleged basis for this Order entered in the absence of and without Notice to Petitioners, was a "scrivener's error."[5]

On appeal, said Judgment was affirmed by the Tenth Circuit. The Judgment ignored the issues of jurisdiction assigned as Error No. 1 and, on rehearing pointing out said error, overruled said Motion without opinion.

Petitioners here allege that in both the suit asserted to be *res judicata*[6] and in the instant case, there was an absence of federal jurisdiction by reason of the fact that for the purposes of both suits, Fidelity, by an act of Congress for purposes of jurisdiction, was a citizen of Okla-

---

[4] See Appendix "H" hereto.

[5] See Appendix "C" hereto.

[6] See Appendix "A", p. 5a hereto.

homa of which State all petitioners here, as well as Thomas Alexander Young, the insured under Fidelity's life insurance policy, was also a citizen.[7]

Petition for Certiorari is sought herein to require said court to observe restrictions upon federal jurisdiction imposed by the Congress of the United States,[8] and for an order to vacate, for lack of federal jurisdiction, all orders and proceedings adverse to plaintiffs and remand this proceeding to the District Court of Creek County, State of Oklahoma, in which it was filed at the cost of the removing parties.

Concerning the question of federal jurisdiction in the case originally decided by the Circuit Court of Appeals, the record will disclose that in that case, all petitioners herein, save Ulrich's mother, Charlotte, were expressly excluded from appearing either in person or by their attorney and further that in that case, federal jurisdiction was, by stipulation, conceded by Charlotte Young's attorney who at all times had not considered the statute making Fidelity an Oklahoma citizen.

The sole issue for determination by this Court on this Petition for Certiorari, is the question the Tenth Circuit refused to consider or decide, to-wit: Upon facts undisputed and apparent on the face of the record, did the United States District Court for the Northern District of Oklahoma, upon removal of a suit filed in the District Court

---

[7] The Opinion erroneously refers to Kansas as the insured's residence.

[8] See Statutes Involved, pages 2-3 of this Petition. Also cited in Opinion of Court of Appeals (Appendix).

of Creek County, Oklahoma by parties not *served*, acquire jurisdiction under the Constitution and laws of the United States, and if no such jurisdiction existed, was it error on the part of the United States Court of Appeals for the Tenth Circuit to refuse consideration of said issue and for want of federal jurisdiction reverse proceedings in the court below with directions to sustain plaintiffs' Motion to Remand?

Pertinent decisions which sustain certiorari include the following:

"Where on looking at record, United States Supreme Court can find no evidence of jurisdiction of Circuit (now District) court, it will reverse decree." *Johnson* v. *Christian*, 125 U.S. 642, 8 S.Ct. 989, 31 L.Ed. 820. (1888).

"In case of defective averment as to citizenship, judgment will be reversed by United States Supreme Court upon its own motion, and case remanded." *Denny* v. *Pironi*, 141 U.S. 121, 11 S.Ct. 966, 35 L.Ed. 657 (1891).

"Although parties do not question federal jurisdiction under 28 USCS, 1332, Court of Appeals must consider matter sue sponte." *Caffery* v. *New York Central Railroad Co.*, 324 F.2d 711 (2d Cir. 1963).

"General appearance in proceeding removed to federal court did not confer jurisdiction of cause not within original jurisdiction." *Mullendore* v. *American Surety Co.*, 27 F.2d 572 (9th Cir. 1928), *cert. den.* 278 U.S. 653, 49 S.Ct. 178, 73 L.Ed. 563.

"Potential absence of diversity is jurisdictional, and must be considered on motion of either party or on court's own motion." *Sessions* v. *Chrysler Corp*, 517 F.2d 759 (9th Cir. 1975).

"Citizenship for purpose of jurisdiction cannot be waived." *Jabubowski* v. *Central Railroad Co.*, 88 F. Supp. 258 (D.C. N.Y. 1950).

"Defendant's failure to raise issue of diversity jurisdiction before final judgment does not amount to waiver, since court may dismiss case for lack of jurisdiction at any stage of proceeding." *Basso* v. *Utah Power & Light Co.*, 495 F.2d 906 (10th Cir. 1974).

Kelleam v. *Maryland Casualty Company*, 312 U.S. 377-382, 85 L.Ed. 899.

That certiorari is warranted is further established from a brief summary of the issues before both the trial and the Circuit Courts as disclosed by the official reports. This controversy involves a question of the liability of Fidelity Union Life Insurance Company under a policy of insurance applied for by Thomas Alexander Young on the 16th day of September, 1974, from which the following is quoted:

"I agree that there shall be no liability hereunder until a policy shall be issued and manually delivered while the state of health of the Proposed Insured is as stated in this application and the first premium actually paid."

The Application contained a further proviso that:

"If the full first premium is paid at the time of this application and in exchange for the Conditional Receipt bearing the same number as this application and if on that date the Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office, insurable and acceptable under the company's rules and practices for the policy, in the amount, on the plan, and otherwise exactly as applied for, then the insurance shall be effective from this date or the

date of the last of any medical examinations or questionnaires required by the Company, if later, subject to the terms of the policy applied for and of the Conditional Receipt."

The policy issued was dated September 18, 1974. The premium demanded by Fidelity differed from that specified in the application. No conditional receipt was appended to the policy when issued or to the application appended thereto. The policy, with the application appended, contained the following:

"The Contract. This policy, together with the application herefor, a copy of which is attached when issued, constitute the entire contract. All statements made by or in behalf of the Insured shall, in the absence of fraud, be deemed representations and not warranties. No statement will void this policy or be used in defense of a claim under it unless contained in the written application and endorsed upon or attached to the policy when issued."

There is a dispute as to the number and amount of premiums paid, but admitted that the monthly premium requested by the writing agent was paid at the delivery of the application. Further, that the applicant's mother, at his request, paid a second monthly premium to the writing agent which was forwarded to and received by the company.

The company, in transmitting the policy for delivery, directed the writing agent to collect an additional 0.01¢ as the first monthly premium.

The policy was delivered December 22, 1974; the insured died from gunshot in line of duty while on active service with the United States Air Force February 14, 1975.

The policy made Young's mother and father principal beneficiaries, his minor brothers contingent beneficiaries.

The beneficiaries assert that the policy was effective as of December 22, 1974; that the company assumed no liability prior to that date; that the two monthly premiums, admittedly paid, obligated Fidelity from December 22, 1974 to February 22, 1975. Ergo: that when rendered February 14, 1975, the policy was in full force and effect.

Fidelity, through its Oklahoma attorneys, asserted falsely that the policy was in effect from September 16, 1974; hence had lapsed at the date of the insured's death.

For filing suit and asserting the policy was in effect and payable, Petitioners were assessed attorney's fees as costs in the sum of $5,165.00 under a procedural statute of the State of Oklahoma not in effect when a case asserted to have decided the issues herein was tried.

Petitioners, to the plea of *res judicata*, responded that all except the mother, Charlotte, had been expressly denied permission to become parties in that case; hence, were not bound by the Judgment therein nor for costs including attorneys' fees.

It's Petitioners' contention that Fidelity and its attorneys perpetrated a fraud, inter alia, in asserting that its policy became effective September 16, 1974, i.e., two days before Airman Young's application was *approved* and the policy dated September 18, 1974 issued, delivered or accepted.

If, when delivered and accepted, the policy had lapsed, it was of no value. Representations to the contrary through

the United States Mails constituted a federal offense. Collection and retention of premiums to January 4, 1975, established by the evidence on hearing Motion to Remand, vested rights in the Administrator of the Estate supporting his claim as a real party in interest, but in no wise obligating him to pay attorneys' fees.

REASONS FOR GRANTING THE WRIT

From the foregoing statement which includes the circumstances established and relevant in the course of the hearing on Motion to Remand, it is respectfully submitted that by reason of lack of federal jurisdiction at any time, it was error for the District Court to overrule and deny Motion to Remand and for the United States Circuit Court of Appeals for the Tenth Circuit to affirm judgments and orders issued without jurisdiction.

CONCLUSION

Petitioners submit that in the circumstances outlined above, they have no remedy save such as available to them by Writ of Certiorari issued by this Honorable Court.

Respectfully submitted,

GLENN O. YOUNG, *pro se*
P. O. Box 1086
Sapulpa, Oklahoma 74066
(918) 224-3131
Attorney for Petitioners

July, 1982

APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed March 23, 1982]

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG AND CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,	)	No. 80-1944
Plaintiffs-Appellants,	)	
v.	)	
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER & GLEN RINEHART, as agents and attorneys,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
For the Northern District of Oklahoma
D.C. No. 79-C-629

Submitted on the briefs:

Glenn O. Young, Sapulpa, Oklahoma, Attorney for Plaintiffs-Appellants.

Elsie Cox Draper, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, Tulsa, Oklahoma, for the Defendants-Appellees.

[APPENDIX]

Before PICKETT, McWILLIAMS and DOYLE

PICKETT, Circuit Judge

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). This cause is therefore ordered submitted without oral argument.

On September 16, 1974, Thomas Alexander Young completed an application for a $20,000.00 double indemnity life insurance policy from Fidelity Union Life Insurance Company, a Texas corporation. The primary beneficiaries were Charlotte Meier Young and Glenn O. Young, mother and father of the insured. Ulrich Waldemar Young and Norbert Nelson Young, minor brothers of the insured, were contingent beneficiaries. The application provided that the premiums would be paid in monthly installments of $30.05. The first monthly installment was paid with the application. The second monthly installment was paid by the insured's mother. No more premiums were paid. The policy was issued on September 18, 1974 and sent to the writing agent who inquired of the insured as to delivery. On December 16, 1974, the policy was sent to the Kansas home of the insured and actually received by him on December 22, 1974. The insured was killed on February 14, 1975. The insurance company denied liability asserting that the policy had lapsed because of non-payment of premiums.

Charlotte Meier Young, as a primary beneficiary, and assignee of Glenn O. Young, in trust for the two younger sons, brought an action in the Creek County, Oklahoma state court, to recover the proceeds of the policy. The insurance company employed the Tulsa, Oklahoma law firm of Gable, Gotwals, Rubin, Fox, Johnson and Baker to represent it in the pending litigation. James M. Sturdivant,

a member of the law firm, was assigned to the case which was removed to the U.S. District Court for the Northern District of Oklahoma. A motion for summary judgment was filed for the insurance company alleging that the policy was not in effect at the date of the death of the insured. Before the disposition of this motion, Glenn O. Young, in his own behalf, as administrator of the estate of his son, Thomas, and as next friend of his two minor sons, moved to intervene in the case. The trial court denied this motion stating that Glenn O. Young had assigned his interest in the policy to his wife, Charlotte, and had no interest therein. The court also held that interests of the minor sons, if any, was represented by their mother, Charlotte, and that the estate of the deceased son had no interest in the litigation. No appeal was taken to the court's denial of this motion.

In the pretrial proceedings, recognizing that only two monthly premiums had been paid, the critical issue was whether the policy became effective on the date of the acceptance of the application or the date that the policy was manually delivered to the insured. This issue was determined on motion for summary judgment filed by the parties. The trial court, following a hearing on these motions, concluded that the unambiguous terms of the application and the policy fixed the effective date as September 16, 1974 and that on the date of the insured's death, it had lapsed for non-payment of premiums. This court affirmed Young v. Fidelity Union Life Insurance Company, 597 F.2d 705 (10th Cir. 1979) in which the court stated:

> Based on the undisputed facts, the effective date of the insurance policy was September 16, 1974, and as only two monthly premiums were paid, the policy by its terms had lapsed when the insured met his untimely death on February 14, 1975. The trial court, under the circumstances, did not err in granting judgment for Fidelity Union.

After the judgment in the first action became final, Glenn O. Young, in person and as administrator of the estate of Thomas Alexander Young, also as father and next friend of his two younger sons, together with his wife, Charlotte, brought this action in the District Court of Creek County, Oklahoma to recover on the same policy which was the subject of the first action.[1] In addition to the insurance company, the attorneys who represented the company in the first action, together with Glen Rinehart, as a policy writing agent for the company, were made defendants. The case was removed to the U.S. District Court for the Northern District of Oklahoma alleging that the inclusion of the attorneys as defendants was a fraudulent joinder for the purpose of defeating Federal jurisdiction. No service was had on the defendant Rinehart and the court dismissed as to him for lack of prosecution. Following a hearing, the court found that no cause of action existed against the attorneys and sustained their motion for summary judgment. The court then denied plaintiffs' motion to remand. It also sustained insurance company's motion for summary judgment holding that the issues had been determined in the former litigation which was binding on the plaintiffs. On application the court allowed attorney fees to the defendants as court costs.

The issues presented by this appeal are whether the trial court erred: (1) in sustaining the attorney's motion for summary judgment and denying plaintiffs' motion to remand; (2) sustaining defendant's motion for summary judgment on the basis of *res judicata;* and (3) allowance of attorney fees to the defendants.

In removal proceedings, when a question arises as to a fraudulent joinder of a resident defendant, the trial court

---

[1] Glenn O. Young was a practicing attorney in the City of Sapulpa, Oklahoma. In this action he appeared pro se and as attorney for the other plaintiffs. In the first case he did not appear as an attorney of record because he expected to be a witness.

is not bound by the allegations in plaintiff's pleadings but may resort to other means to determine if a cause of action exists as to that defendant. Dodd v. Fawcett Publications, Inc., 329 F.2d 82 (10th Cir. 1964); Wilson v. Republic Iron & Steel Company et al, 257 U.S. 92 (1921); Smoot v. Chicago, Rock Island and Pacific Railroad Company, 378 F.2d 879 (10th Cir. 1967).

There is a suggestion in the vague allegations of the pleadings, the extensive arguments at the hearing on the motion for summary judgment and the briefs filed in this court that the insurance company and its attorneys joined in a sinister scheme or plot to fraudulently mislead the District Court and this court in finding against them in the first case on the simple issue of the effective date of the policy. The record in the first and in this case is completely devoid of any indication of misconduct on the part of the attorneys for the insurance company. The inclusion of them as defendants is an obvious sham and frivolous. The court did not err in sustaining the motion for summary judgment and overruling the motion to remand.

It is next urged that the trial court erred in sustaining the insurance company's motion for summary judgment for the reason that the plaintiffs were bound by a final judgment in a former case. *Res judicata* means that a matter has been previously settled by a final judgment. (Black's Law Dictionary; 46 Am. Jur. 2d Judgments §395, p. 559).

The doctrine is firmly established in the law. It is in the nature of an estoppel, the purpose of which is designed to put an end to litigation of claims which have been previously determined by final judgment. It bars all parties and their privies from recovery on matters which have been duly adjudicated or should have been adjudicated in prior litigation. In Guarantee Acceptance Corporation v. Fidelity Mortgage Investors, 544 F.2d 449 (10th Cir. 1976), this court stated:

> Under the doctrine of res judicata, a prior adjudication between the parties or their privies on the same

cause of action is conclusive as to all matters which are, were or should have been litigated. Spence v. Latting, 512 F.2d 93 (10th Cir. 1975) *cert. denied*, 423 U.S. 896.

In Brown v. Felson, 442 U.S. 127, the court said:

> Res judicata ensures the finality of decisions. Under res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979). Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings. Chicott County Drainage Dist v. Baxter State Bank, 308 U.S. 371, 378 (1940); 1B J. Moore, Federal Practice ¶0.405 [1] (2d ed. 1974). Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

See also Katzburg v. Krebs et al., 545 F.2d 104 (10th Cir. 1976); *Spence* v. *Latting*, 512 F.2d 93 (10th Cir. 1975) *cert. denied*, 423 U.S. 896.

We need not determine whether this action can be maintained as a collateral attack upon the former judgment as the plaintiffs cannot prevail in any event. The gist of the allegations in the complaint and the arguments in their support appears to be that the representative of the insurance company and their agents, after the death of the insured, entered into some kind of a sinister plot or conspiracy to prevent those entitled to the policy proceeds from proving their right and to mislead the trial court and this court into not accepting their interpretation of the policy provisions. These allegations, if they were material in respect in determining liability on the policy, could have been presented in the first case. The policy provisions

determine the rights and obligations of the parties. The Youngs can prevail only if the policy is in effect on the date of the death of the insured. This was the issue which was fully considered by the trial court and by this court in the first action. The final judgment was contrary to the contentions of the Youngs and they cannot be relitigated.

Relying on Oklahoma statute, Title 36 O.S. §3629(B),[2] the insurance company sought an allowance for attorney fees in the action. In support of this motion, the insurance company submitted an itemized statement of the services rendered and the amounts charged therefor. A knowledgeable practicing attorney in the Tulsa, Oklahoma area testified that the value of the services rendered was substantially more than those contained in the statement. The Youngs did not contest the right to an allowance for attorney fees and offered no evidence as to their value. The court allowed the claim in the amount of $5,165.00. There was ample evidence to support the reasonableness of this award.

AFFIRMED.

---

[2] Title 36 O.S. §3629(b) reads: It shall be the duty of the insurer receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a *judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party.* For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party. This provision shall not apply to uninsured motorist coverage. 36 O.S. 3629(B) (1977 Supp.)

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM — April 22, 1982

Before Honorable Robert H. McWilliams, Honorable William E. Doyle, and Honorable John C. Pickett, Circuit Judges

ULRICH WALDEMAR YOUNG, a Minor, NORBERT NELSON YOUNG, and CHARLOTTE MARIE YOUNG, and GLENN O. YOUNG in person and as the Administrator of the Estate of Thomas Alexander Young, and Father and Next Friend of Ulrich Waldemar Young and Norbert Nelson Young, Plaintiffs-Appellants,	)	No. 80-1944
vs	)	
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, and GLEN RINEHART, as Agents and Attorneys, Defendants-Appellees.	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed August 8, 1980]

ULRICH WALDEMAR YOUNG, a minor, et al.,	)	
Plaintiffs,	)	
vs.	)	79-C-629-BT
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, et al.,	)	
Defendants.	)	

ORDER

It having come to the Court's attention a scrivener's error was made in the Order and Judgment heretofore entered in this case on July 29, 1980, in that the amount of Judgment to be awarded was reflected as $3,651.25, when it should have been $5,165.00,

IT IS ORDERED the Order entered July 29, 1980, and the Judgment entered July 29, 1980, be amended to show the correct amount of $5,165.00 instead of $3,651.25.

ENTERED this 5th day of August, 1980.

(s) *Thomas R. Brett*

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed July 29, 1980]

ULRICH WALDEMAR YOUNG, a minor, et al., Plaintiffs,	)	
vs.	)	79-C-629-BT
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, et al., Defendants.	)	

ORDER

This matter came on for hearing before the undersigned Judge on July 2, 1980, on the Motion for New Trial and for Rehearing filed by plaintiffs; hearing on the Counterclaim of the defendant, Fidelity Union Life Insurance Company. At the conclusion of the arguments and evidence the Court took the matters under advisement.

The Court has reviewed the Motion for New Trial and for Rehearing filed by plaintiffs; has considered the ent're file, including the additional authorities presented by plaintiffs in their Motion to Include and Cite Additional Authorities at Oral Argument on Motion for New Trial; the briefs filed by the parties; the oral argument of the parties.

The Court is not persuaded by plaintiffs's arguments that the previous order entered on June 3, 1980, is incorrect. The Court, therefore, finds plaintiffs' Motion for New Trial and for Rehearing should be overruled.

In the Order entered June 3, 1980, the Court made the following finding relevant to the counterclaim of Fidelity Union Life Insurance Company: "This order is not dispositive of the Counterclaim and it will be set for hearing."

Fidelity Union Life Insurance Company seeks to recover attorney fees pursuant to 36 O.S. §3629(B) (1977 Supp.) which provides, in pertinent part:

> "It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon judgment rendered to either party, costs and attorney fees shall be allowed to the prevailing party."

Case 76-C-30-C, styled "Charlotte Meier Young, etc., Plaintiff, vs. Fidelity Union Life Insurance Company, Defendant", decided by the Honorable H. Dale Cook, and affirmed by the Tenth Circuit Court of Appeals in *Young* v. *Fidelity U. Life Ins. Co.*, 597 F.2d 705 (10th Cir. 1979), was filed prior to the enactment of 36 O.S. §3629(B) (1977 Supp.) and Fidelity claimed no attorney fees in that case, nor was Fidelity entitled to claim attorney fees in that case.

Fidelity Union Life Insurance Company contends it is entitled to recover attorney fees and costs in this action as the prevailing party.

The evidence and exhibits in the present case (attached to the Answer of Fidelity Union Life Insurance Company) reveal plaintiffs made an oral demand for the benefits they claimed on March 6, 1975; a written demand on March 12, 1975; filed a Casualty Report and Proof of Death Claim on March 19, 1975. The evidence further shows Fidelity Union Life Insurance Company denied in writing the benefits on March 6 and April 18, 1975. The Court finds this correspondence sufficient to bring the defendant insurance company within the confines of 36 O.S. §3629(B) (1977 Supp.) and entitle it to claim attorney fees and costs.

At the hearing, Fidelity Union Life Insurance Company filed an Affidavit in open Court, with an exhibit attached, which revealed the claim of the insurance company

for legal fees as follows: 79.75 hours at $45.00 per hour — $3,588.75; 1.25 hours at $50.00 per hour — $62.50; total claim — $3,651.25.

Fidelity Union Life Insurance Company also called as a witness Mr. David Fist, a member of the bar of this Court, who after being duly sworn and qualified, testified as to the reasonableness of the fees sought by the insurance company. Mr. Fist testified in his opinion the claimed attorney fees were low and modest and certainly reasonable.

The Court, upon reviewing the entire record and the evidence adduced, finds the attorney fees sought in the amount of $3,651.25 are reasonable.

The Court finds Fidelity Union Life Insurance Company is entitled to recover attorney fees in the sum of $3,651.25 pursuant to 36 O.S. §3629(B) (1977 Supp.) and is entitled to have judgment rendered in that amount on its counterclaim.

IT IS THEREFORE, ORDERED as follows:

1. Plaintiffs' Motion for New Trial and Motion to Reconsider be overruled.

2. Defendant, Fidelity Union Life Insurance Company is entitled to recover attorney fees in the amount of $3,651.25 on its counterclaim and have judgment entered in its favor and against Charlotte Marie Young; Glenn O. Young, as the Administrator of the Estate of Thomas Alexander Young; and Glenn O. Young, as Father and Next Friend of Ulrich Waldemar Young and Norbert Nelson Young.

ENTERED this 29 day of July, 1980.

(s) *Thomas R. Brett*
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed July 29, 1980]

ULRICH WALDEMAR YOUNG, a minor, et al.,	)	
Plaintiffs,	)	
vs.	)	79-C-629-BT
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, et al.,	)	
Defendants.	)	

JUDGMENT

Pursuant to the Order entered simultaneously with this Judgment, IT IS ORDERED Judgment be entered in favor of the defendant, Fidelity Union Life Insurance Company, and against Charlotte Marie Young; Glenn O. Young, as the Administrator of the Estate of Thomas Alexander Young; and Glenn O. Young, as Father and Next Friend of Ulrich Waldemar Young and Norbert Nelson Young, in the amount of $3,651.25.

ENTERED this 29 day of July, 1980.

(s) *Thomas R. Brett*
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE DISTRICT COURT IN AND FOR
CREEK COUNTY, SAPULPA DIVISION,
STATE OF OKLAHOMA

ULRICH WALDEMAN YOUNG, a Minor, NORBERT NELSON YOUNG, and CHARLOTTE MARIE YOUNG, and GLENN O. YOUNG in person and as the Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,	)	
Plaintiffs,	)	No. C-79-301
vs.	)	
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, and GLEN RINEHART, as Agents and Attorneys,	)	
Defendants.	)	

REMOVAL PETITION AND REMOVAL BOND

COME NOW the defendants, the Fidelity Union Life Insurance Company, James M. Sturdivant, and Gable, Gotwals, Rubin, Fox, Johnson & Baker, and file herewith the Removal Petition and Removal Bond filed in the United States District Court for the Northern District of Oklahoma, on October 5, 1979, styled as above.

(s) *Elsie Draper*
GABLE, GOTWALS, RUBIN, FOX,
JOHNSON & BAKER
20th Floor, Fourth National Bldg.
Tulsa, Oklahoma 74119
918/582-9201

Attorneys for Defendants

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed January 30, 1976]

CHARLOTTE MEIER YOUNG, in person and as Assignee in trust for her minor sons, Norbert Nelson and Ulrich Waldemar Young, Plaintiff as Respondent,	)	
vs.	)	No. 76-C-30
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, Defendant as Petitioner,	)	

PETITION FOR REMOVAL

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Comes now the Defendant, FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, and for its petition for removal respectfully shows:

1. On January 13, 1976, an action was commenced against petitioner, FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, in the District Court of Creek County, Oklahoma, entitled "Charlotte Meier Young, in person and as Assignee in trust for her minor sons, Norbert Nelson and Ulrich Waldemar Young, Plaintiff, v. Fidelity Union Life Insurance Company, a stock company, Dallas, Texas, Defendant", being Cause No. C-76-14 in said Court. Thereafter, the Plaintiff in said action caused to be issued a summons out of the District Court of Creek County, Oklahoma, which summons and a copy of the Plaintiff's complaint were served upon The Honorable Gerald Grimes, State Insurance Commissioner for the State

of Oklahoma, as statutory service agent for FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, on January 14, 1976, requiring answer on or before February 12, 1976. Thereafter, said summons and complaint were forwarded by The Honorable Gerald Grimes, State Insurance Commissioner, to FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, same being received on January 16, 1976. Full, true, and correct copies of the complaint, summons, and letter of transmittal from the State Insurance Commissioner to FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, are hereto attached, which constitute all of the pleadings, process, and orders served upon petitioner in such action.

2. The above described action is one of which this court has original jurisdiction under the provisions of Title 28, United States Code, Section 1332, and is one which may be removed to this court by petitioner, Defendant herein, pursuant to the provisions of Title 28, United States Code, Section 1441, in that it is a civil action wherein the matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000), exclusive of interest and costs, and is between citizens and residents of different states. At the time this action was commenced, the Plaintiff was and still is a citizen and resident of the City of Sapulpa, Creek County, State of Oklahoma, and the Defendant, at the time of commencement of this action, was and still is a stock company organized under the Texas Laws, with its principal office and place of business located at Dallas, Texas, by reason whereof there is a complete diversity of citizenship between Plaintiff and Defendant in said action.

3. Petitioner herewith files a bond with good and sufficient surety conditioned, as provided by Title 28, United States Code, Section 1446(d) that it will pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that the case was not removable or was improperly removed.

WHEREFORE, petitioner, FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, respectfully prays that the above action now pending against it in the District Court of Creek County, Oklahoma, be removed therefrom to this court.

(s) *Jim M. Sturdivant*
James M. Sturdivant for

GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER
2010 Fourth National Bank Bldg.
Tulsa, Oklahoma
(918) 582-9201

Attorneys for Defendant and Petitioner,
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company

STATE OF OKLAHOMA)(
)(ss.
COUNTY OF TULSA)(

James M. Sturdivant, of lawful age, being first duly sworn on oath states:

That he is the attorney for the Defendant, FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, petitioner herein, and makes this affidavit for the reason that the Defendant is not a resident of Tulsa County and is absent therefrom; that affiant has read the foregoing Petition for Removal, is familiar with the contents thereof,

and believes that the facts therein set forth are true and correct.

(s) *Jim M. Sturdivant*
James M. Sturdivant

Subscribed and sworn to before me this *30th* day of *January*, 1976.

(s) *Dorothy A. Balis*
Notary Public

My Commission Expires:
6-24-79

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed November 6, 1979]

ULRICH WALDEMAR YOUNG, a Minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, IN PERSON AND AS THE ADMINISTRATOR OF THE ESTATE OF THOMAS ALEXANDER YOUNG AND FATHER AND NEXT FRIEND OF ULRICH WALDEMAR YOUNG AND NORBERT NELSON YOUNG,	Plaintiffs,	No. 79-C-629-C
vs.		
FIDELITY UNION INSURANCE COMPANY, a stock company, Dallas, Texas, JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, and GLEN RINEHART, AS AGENT AND ATTORNEYS,	Defendants.	

PLAINTIFFS WITHDRAWAL OF DISMISSAL AND MOTION TO REMAND

Responding to minute order of the Honorable H. Dale Cook, U. S. District Judge, entered under date of October 24, 1979, plaintiffs confess and agree to defendants' Motion to Strike Dismissal and in lieu thereof move to remand this cause to the District Court of Creek County, from which the same was unlawfully and illegally removed in violation of the laws and statutes of the United States. (See 28 U.S.C. 1441.)

(s) *Glenn O. Young*
Glenn O. Young, pro se
and Attorney for Plaintiffs.

APPENDIX I

[Page 3 of Brief of Appellants' in the United States Court of Appeals Tenth Circuit, Dated November, 1980]

* * *. In event plaintiffs contentions that the Court erred in overruling their Motion to Remand is sustained, consideration of all other issues will, of course, be irrelevant since if issued without jurisdiction, such determinations are without binding force or effect and need not be here further considered or adjudicated save by an order to vacate for want of jurisdiction.

POINTS AND ISSUES

I

There was an absence of federal jurisdiction in the U. S. District Court for the Northern District of Oklahoma, and for said reason, the trial judge erred in summarily overuling and denying Appellants' Motion to Remand.

II

Said judgment advanced as *res judicata* is void upon the face of the record for want of federal jurisdiction to render the same.

III

The Trial Court erred in granting Summary Judgment dismissing plaintiffs' claims against defendant attorneys, fees claimed in favor of Fidelity on its Cross-Petition.

A.

For want of jurisdiction of any Cross-Petition or Motion to Dismiss.

B.

For failure of evidence to show that attorneys fees allowed Fidelity were just, due and unpaid.

C.

The amount allowed was so excessive as to constitute evidence of bias and prejudice.

IV

The Trial Court erred in finding plaintiffs' evidence insufficient under the laws of Oklahoma to state a cause of action for fraud and deceit.

A.

The Trial Court disregarded law on fraud.

B.

An insurance company may not demand and collect premiums on a policy of insurance for a period during which it assumes no risks. The delivery of the policy was pre-requisite to its effectiveness and therefore the date from which premiums were earned and due.

Office - Supreme Court, U.S.
FILED
AUG 18 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2401

In the Supreme Court of the United States

OCTOBER TERM, 1982

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,
Petitioners,

v.

FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas; JAMES M. STURDIVANT, GABLE, GOTWALS, RUBEN, FOX, JOHNSON & BAKER, as Attorneys,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JAMES M. STURDIVANT
ELSIE DRAPER
GABLE & GOTWALS
20th Floor, Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201
Attorneys for Respondents

August, 1982

TABLE OF CONTENTS

	PAGE
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	5

TABLE OF AUTHORITIES

Cases	PAGE(S)
Young v. *Fidelity Union Life Insurance Company*, 597 F.2d 795 (10th Cir. 1979)	2
Statutes and Codes	
28 U.S.C. § 1332	2, 5
28 U.S.C. § 1441	4, 5
Miscellaneous	
Black's Law Dictionary, 723 (rev. 5th ed. 1979)	4, 5

No. 81-2401

In the Supreme Court of the United States

OCTOBER TERM, 1982

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,
Petitioners,

v.

FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas; JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, as Attorneys,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

SUMMARY OF ARGUMENT

The decision below was in accord with the law governing federal court jurisdiction. Petitioners' assertion that Fidelity Union Life Insurance Company, Respondent, a Texas Company, must be regarded as a citizen of Oklahoma in an action on a contract for life insurance, thus creating an absence of federal jurisdiction, is premised on

an erroneous reading of the applicable statute and, therefore, is without merit. There is no question of law at issue that justifies the grant of a writ of certiorari.

ARGUMENT

This case involves a second attempt by the Petitioner Charlotte Young, and those in privity with her, to recover on a policy of life insurance issued by the Respondent, Fidelity Union Life Insurance Company (hereinafter "Fidelity"), to Thomas Alexander Young. The policy in question was issued on September 18, 1974 and lapsed for nonpayment of premiums on December 19, 1974. Thomas died on February 14, 1975, fifty-seven (57) days after the policy became of no force and effect.

In the first case, originally filed in the District Court in and for Creek County, Oklahoma and removed to the United States District Court for the Northern District of Oklahoma by reason of diversity, judgment was granted to Fidelity on a motion for summary judgment and affirmed by the Court of Appeals in *Young* v. *Fidelity Union Life Insurance Company*, 597 F.2d 705 (10th Cir. 1979). Thereafter, the Petitioners here sought to relitigate the issues already decided and affirmed by filing a second suit in the state court, adding as defendants Fidelity's Oklahoma attorneys. Upon removal, the United States District Court for the Northern District of Oklahoma dismissed the allegations against the attorney defendants on the grounds of fraudulent joinder and granted judgment for Fidelity on the basis of *res judicata*. The action of the District Court was affirmed by the Court of Appeals on March 23, 1982

and the opinion of that court is set forth in full in Appendix A to Petitioners' Petition for Writ of Certiorari on file herein.

The Petitioners now seek to have both decisions of the United States District Court for the Northern District of Oklahoma and both decision of the Tenth Circuit Court of Appeals set aside on the basis that neither of these courts at any time had jurisdiction to decide matters involving this particular policy of insurance and the rights of these parties. In support of this position, the Petitioners claim that Fidelity must, for the purposes of the litigation, be considered a citizen of Oklahoma and not a citizen of Texas, the state in which it is incorporated and has its principal place of business. Pursuing this theory, the Petitioners claim that the diversity of citizenship necessary for federal jurisdiction is lacking and that all prior decisions of the federal courts in this matter are void.

The assertion of lack of jurisdiction is clearly without merit as 28 U.S.C. § 1332 provides in pertinent part that:

> "(a) The District Court shall have original jurisdiction of all civil actions where the matter in controversy . . . is between:
>
> (a) citizens of different States:
>
> * * * *
>
> (c) For the purposes of this section and section 1441 of this title [28 USCS § 1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: . . ."

Fidelity is a stock company, organized under the laws of Texas, with its principal office and place of business

located in Dallas, Texas. All of the Petitioners are residents of the State of Oklahoma. The only defendants who are also residents of Oklahoma were named in the second case. These were James M. Sturdivant and the law firm of Gable, Gotwals, Rubin, Fox, Johnson & Baker, the attorneys for Fidelity in the first case. The District Court found that the Oklahoma residents had been fraudulently joined and dismissed as to them. Petitioners do not appear to contest this ruling, "since Fidelity and its attorneys and plaintiffs were all, for the purposes of this suit, Oklahoma citizens, whether they were fraudulently joined or not was immaterial to the case." Petition. p. 4. Instead, Petitioners rely on that portion of 28 U.S.C. § 1441 which reads in pertinent part as follows:

> "Provided further, That in any direct action against *the insurer of a policy or contract of liability insurance* whether incorporated or unincorporated in which action the insured is not joined as a party-defendant, *such insurer shall be deemed a citizen of the state of which the insured is a citizen* as well as any state by which the insured has been incorporated and of the state where it has its principal place of business." (Emphasis added.)

The error of Petitioners' argument is patent. Liability insurance is "that form of insurance which indemnifies against liability on account of injuries to the person or property of another." *Black's Law Dictionary*, 723 (rev. 5th ed. 1979). The policy at issue in both the cases filed by Petitioners was a policy of life insurance. Life insurance is distinguishable from liability insurance, "being a contract between a holder of a policy and an insurance company . . . whereby the company agrees, in return for premium payments, to pay a specified sum to the designated beneficiary

upon the death of the insured." *Black's Law Dictionary,* 723 (rev. 5th ed. 1979).

Petitioners' assertion that there is a lack of diversity is, therefore, based on an erroneous reading of the controlling statutes, 28 U.S.C. §§ 1332, 1441.

CONCLUSION

It is respectfully submitted that the Petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decisions below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals correctly held that the conclusion of law of the trial court respecting federal jurisdiction was not clearly erroneous.

Respectfully submitted,

JAMES M. STURDIVANT
ELSIE DRAPER
GABLE & GOTWALS
20th Floor, Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201

Attorneys for Respondents

August, 1982

Office - Supreme Court, U.S.
FILED
SEP 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2401

In the Supreme Court of the United States

OCTOBER TERM, 1982

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,
Petitioners,

v.

FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas; JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, as Attorneys,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS

GLENN O. YOUNG, *pro se*
P. O. Box 1086
Sapulpa, Oklahoma 74066
(918) 224-3131

Attorneys for Petitioners

September, 1982

TABLE OF CONTENTS

	PAGE
REPLY BRIEF OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION	1
ISSUE BEFORE THE COURT	3
CONCLUSION	5
APPENDIX AA: Petition in the District Court of Creek County, Sapulpa Division, filed Sept. 14, 1979.	
APPENDIX BB: Opinion of Justice McWilliams, 10th Circiut Court of Appeals, filed April 30, 1979.	

TABLE OF AUTHORITIES

United States Code

28 U.S.C. § 1441 ..... 1, 3, 5

Miscellaneous

Black's Law Dictionary, 723 (Rev. 5th Ed. 1979) 2

Webster's International Dictionary (2d ed. 1934), p. 756 2

No. 81-2401

In the Supreme Court of the United States

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,
Petitioners,

v.

FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas; JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, as Attorneys,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS (Rule 22.5)

In opposition to Petitioners' prayer for a Writ of Certiorari, respondents' distinguished attorneys rely upon a single proposition, to-wit: that, in 28 U.S.C. § 1441, Fidelity, for the purposes of this case, is not a citizen of Oklahoma because the term "liability insurance" ~~includes~~ excludes "life insurance."

Sole authority for this contention is *Black's Law Dictionary*, 723 (Rev. 5th Ed. 1979). They concede that therein, the term "liability insurance" is defined as:

> "That form of insurance which indemnifies against liability on account of injuries to the person or property of another."

They follow with a statement that:

> "The policy at issue in both the cases filed by Petitioners was a policy of life insurance. Life insurance is *distinguishable* from liability insurance, 'being a contract between a holder of a policy and an insurance company . . . whereby the company agrees, in return for premium payments, to pay a specified sum to the designated.'" (Italics added)

The sole authority cited by them is the same, *viz.*, *Black's Law Dictionary*, 723 (Rev. 5th ed. 1979). No decision by any court that "liability insurance" *excludes* "life insurance" is cited or has been found by your counsellor in a diligent search of the authorities.

The error in their logic lies in their statement (page 4) that: "Life insurance is *distinguishable* from *liability* insurance." (Italics added)

Distinguishable is defined in *Webster's International Dictionary* (2d ed. 1934), page 756, *inter alia*, as "capable of being distinguished . . ." Not that it is or has been distinguished. The same authority, at page 1423, describes *liability* as:

> "State or quality of being liable, as the liability of an insurer . . ."

Respondents cite no case nor authority for their contention that in 28 U.S.C. § 1441,

"a policy is a contract of liability insurance"

does not include *any policy or contract whereby the insurer assumes liability.*

ISSUE BEFORE THE COURT

A further flaw is obvious in their reasoning. The issue here is whether, on any ground, the cause of action Petitioners filed in the District Court of Creek County, Oklahoma was, upon its face, or based upon any evidence tendered by them, one of which the U. S. District Court had jurisdiction. A copy of the Petition therein is hereto appended as Appendix "AA". That the issue upon which respondents hang their hat was neither considered nor determined is apparent from the Judgments appearing in Appendices "A", "B", "C", "D" and "E" to the Petition for Writ of Certiorari of Petitioners, and further apparent from the published Opinion by Mr. Justice McWilliams, Circuit Judge, which, for convenience, is also appended hereto as Appendix "BB".

Respondents take no issue on Petitioners' allegation that on Motion to Remand, the burden of proof of federal jurisdiction is upon them. This included, obviously, proof that the U. S. District Court below had jurisdiction in absence of Petitioners to render the Judgment appended to the Petition herein as Appendix "C", allowing *attorneys' fees* in the sum of $5,165.00 instead of $3,651.25, entered August 5, 1980, against each and every petitioner herein. In this connection, this Court will note that if the Judg-

ment in the case wherein all petitioners, save the murdered son's mother, herein were expressly excluded, the issues herein became *res judicata*. It follows that costs in that case were as effectively *res judicata* as any other issue. Not only so, but the Judgment claimed to be *res judicata*, as disclosed by the record herein, was *rendered before the Oklahoma Statute allowing any attorneys' fees had been enacted*. This is revealed by the Opinion of the Circuit Court itself. (See footnote quoting it, Petition App. 7a.)

In the Opinion asserted to be *res judicata* (hereto appended as Appendix "BB"), it will be noted that the Circuit Court disregarded the express provisions of both the Application for Insurance and the Policy declaring the policy in controversy ineffective until and unless manually delivered to the insured while in the same state of health as at the date of the application. The Circuit Court concluded its Opinion with the following paragraph:

> "Based on the undisputed facts, the effective date of the insurance policy was September 16, 1974, and as only two monthly premiums had been paid, the policy by its terms had lapsed when the insured met his untimely death on February 14, 1975. The trial court, under the circumstances, did not err in granting summary judgment for Fidelity Union."

Petitioners reiterate for emphasis the irrefutable fact that in both denying recovery in the first case and holding the issue *res judicata* in the case at bar, both Judgments are void upon the face of the record. The insurance policy was dated September 18, 1974, hence could not have been, on the undisputed facts, effective September 16, 1974, that is *two days before the application was received, approved*, or the policy in question dated, issued or delivered.

The undisputed evidence is that the policy became effective on delivery December 22, 1974. Calculated from that date, premiums were paid in full to February 22, 1975 (two months). If the grace period (31 days) be added, the policy did not lapse until March 25, 1975, i.e., *after* the death of the insured, United States Airman, Thomas Alexander Young, on February 14, 1975. (February 1975 had 28 days.)

CONCLUSION

The Brief of Respondents in opposition to Petition for Certiorari only buttresses and reinforces the fact that under Rule 13, there are special and important reasons why the Writ sought herein should be granted. The issue of domicile of an insurer like Fidelity under 28 U.S.C. § 1441 is of general public concern throughout the Nation and should be, but has never been, decided.

Respectfully submitted,

GLENN O. YOUNG, *pro se*
P. O. Box 1086
Sapulpa, Oklahoma 74066
(918) 224-3131

Attorneys for Petitioners

September, 1982

APPENDIX AA

IN AND FOR THE DISTRICT COURT OF
CREEK COUNTY, SAPULPA DIVISION,
STATE OF OKLAHOMA

[Filed Sept. 14, 1979]

ULRICH WALDEMAN YOUNG, a Minor, NORBERT NELSON YOUNG, and CHARLOTTE MARIE YOUNG, and GLENN O. YOUNG in person and as the Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,	)	
Plaintiffs,	)	No. C-79-301
vs.	)	
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, and GLEN RINEHART, as Agents and Attorneys,	)	
Defendants.	)	

PETITION

Plaintiffs allege that on September 16, 1974, Thomas Alexander Young completed and executed an Application for insurance with defendant, Fidelity Union Life Insurance Company through defendant Glen Rinehart, its local agent in Dallas, Texas. The application was for life insurance in the amount of Twenty Thousand Dollars ($20,000.00) with double indemnification in case of accidental death and with a provision for waiver of premiums in the event of disability. On the date Young completed the application, he gave the agent a money order in the amount of $30.06 as payment for the first month's premium which was promptly

delivered to Fidelity Union Life Insurance Company whose home office is in Dallas, along with the application. The application contained the following language concerning the effective date of the policy:

> *"I agree that there shall be no liability hereunder until a policy shall be issued and manually delivered while the state of health of the proposed insured is as stated in this application and the first premium actually paid . . ."*

Plaintiff alleges that said local agent orally represented to said Young, at the time said application was issued, that a policy conformable thereto would be issued and delivered to him promptly for his examination and approval; that thereupon and conformable to said insurance policy, the same would become in full force and effect. Its policy which was, through no fault of applicant, retained, held and kept by said company, its aforesaid agent, Rinehart, or others, to defendant unknown, and not manually delivered until December 22, 1974, from which date to the death of the insured on Feb. 14, 1975 all premiums due and earned were fully paid.

That said policy of insurance contained a provisio upon its face reading as follows:

> *"Now that you have bought this policy beware of any agent who advises you to discontinue it in order to take another in its place. He may be seeking his own profit at your expense. If he is sincerely interested in your behalf, he will be willing to submit his recommendations to you in writing, suggesting his reasons for recommending that you replace your Fidelity Union Policy. Then we will be glad to advise you if you forward his recommendations to us.*
>
> *To collect any benefit due under a Fidelity Union Life Policy, write direct to the Company. It is not necessary to employ any person, firm or corporation*

in collecting the insurance under this policy or in receiving any of the benefits. Time and expense will be saved by writing direct to the Home Office of the Company, Dallas, Texas."

Plaintiffs further allege that in efforts to avoid obligations assumed and due under said policy and notwithstanding the aforesaid proviso, said defendants, acting jointly, and in furtherance of a common design, together with other agents, Charles E. Eubanks, Robert L. Taylor, Jr., and others to plaintiffs unknown, have continued and do continue to evade and avoid payment conformable to said policy, more particularly by acts such as the following:

1. Upon learning of the death of said decedent, or in anticipation thereof, they destroyed or caused to be destroyed all their original records pertinent thereto.
2. Denied the issuance and delivery of a policy and pretended they had two insureds of the same name and couldn't determine the policy involved.
3. Asserted Glenn Darrell Rinehart had no authority to collect insurance premiums, save the first.
4. Refused to produce or furnish plaintiff or Glenn Olen Young a copy of the agency contract.
5. Represented that there had been a "change in policy", but refused to elaborate or explain or to furnish a copy thereof or any details concerning the same.
6. Refused repeatedly to furnish copies of correspondence, more particularly letters from Thomas and her, and a letter from Glenn Darrell Rinehart to plaintiff, which plaintiff returned at the time she remitted the premium hereinabove referred to.

7. Denied payment of premiums to said agent, Rinehart, by or on behalf of plaintiff's son, Thomas, had been made, and if made, were binding or valid.

8. Concealed and denied issuance of the aforesaid notice, anent the January, 1975 premium on any insurance policy.

9. Aided, abetted and induced Glenn Darrell Rinehart, its agent, to refuse to talk, testify or give evidence within his knowledge concerning the "change in policy" or reasons for delay in delivery of said policy and payment of premiums thereon.

10. Falsely wrote a letter dated December 29, 1975, wherein said defendant by its Vice President and Associate General Counsel, Robert L. Taylor, Jr., C.L.U., stated:

    (a) "Your charges that the agent's move to California was related to this lawsuit are absolutely untrue and unfounded . . ."

    (b) "This company has made available to your attorney and to the Oklahoma Department of Insurance a full and complete disclosure of all of its records and actions with regard to this policy and to this claim."

    (c) ". . . when you visited our Home Office, our Claims Manager, Mr. Eubanks, made you hard copies of our microfilm records of this particular policy . . ."

    (d) "The policy was not in force on the date of his death . . ."

    (e) "It's regretted the policy was not in force when your son died."

That all benefits under said policy, including premiums paid, have been retained, held and kept by defendants to the damage and detriment of plaintiffs in the sum of Forty Thousand Dollars ($40,000.00) plus statutory interest, additional damages, attorney fees and costs in a sum of Twenty-five Thousand Dollars ($25,000.00) for which plaintiffs bring this suit and pray judgment.

(s) *Glenn O. Young*
Glenn O. Young, *pro se*

APPENDIX BB

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed April 30, 1979]

No. 77-1606

CHARLOTTE MEIER YOUNG, in person and as Assignee in trust for her minor sons, NORBERT NELSON and ULRICH WALDEMAR YOUNG,
Plaintiff-Appellant,
v.
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D. C. No. 76-C-30)

Wesley R. Thompson, for Plaintiff-Appellant.

James M. Sturdivant (Elsie Cox Draper and GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, on the brief), for Defendant-Appellee.

Before McWILLIAMS, BARRETT and McKAY, Circuit Judges.

[APPENDIX]

McWILLIAMS, Circuit Judge.

The issue here is whether the trial court erred in holding that a policy of life insurance issued to one Thomas Alexander Young by Fidelity Union Life Insurance Company had lapsed for non-payment of premiums prior to Young's death. We hold that the trial court did not err, and we therefore affirm.

Charlotte Meier Young, in her own name and as a so-called "assignee in trust" for two minor sons, brought the present action against Fidelity Union on a policy of life insurance issued to another son, Thomas Alexander Young. The latter was shot and killed by a robber on February 14, 1975. One issue formed by the pleadings was whether the policy of insurance was in force and effect on the date of the insured's untimely death or, on the contrary, had lapsed because of non-payment of premiums. Both Young and Fidelity Union filed motions for summary judgment supported by affidavits and depositions. The trial court granted Fidelity Union's motion and denied Young's. The latter now appeals the judgment entered in favor of Fidelity Union.

On September 16, 1974, Thomas Alexander Young completed and executed an application for life insurance with Fidelity Union through its local Oklahoma agent. The application was for life insurance in the amount of $20,000, with double indemnification in the case of accidental death and with a provision for waiver of premiums in the event of disability. On the date that Young completed the application, he gave the local agent a money order in the amount of $30.06 as payment for the first month's premium. The money order was forwarded to Fidelity Union along with the application. The application contained the following language concerning the effective date of the policy:

> I agree that there shall be no liability hereunder until a policy shall be issued and manually delivered

while the state of health of the Proposed Insured is as stated in this application and the first premium actually paid. If the full first premium is paid at the time of this application and in exchange for the Conditional Receipt bearing the same number as this application and if on that date the Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office, insurable and acceptable under the Company's rules and practices for the policy, in the amount, on the plan, and otherwise exactly as applied for, then the insurance shall be effective from this date or the date of the last of any medical examinations or questionnaires required by the Company, if later, subject to the terms of the policy applied for and of the Conditional Receipt.

In exchange for the first month's premium, the local agent gave Young a so-called Conditional Receipt which bore the same number as the application and contained the following language:

1. This payment is made and accepted subject to the following conditions: (1) if settlement for the first full premium is made at the time of making this part of the application and (2) if on that date Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office insurable and acceptable under the Company's rules and practices for the policy in the amount, on the plan, and otherwise exactly as applied for, and if both conditions are met then the insurance shall be effective from date of this application, or the date of the last of any medical examinations or aviation or occupational questionnaires required by the Company in connection with this application, if later.

On September 18, 1974, a policy of life insurance was issued to Young by Fidelity Union in the face amount of

$20,000, with a double indemnity provision in case of accidental death and with a provision for waiver of premium in the event of disability. The policy was mailed by Fidelity Union on October 1, 1974, to the local agent for delivery to Young. Young was then in military service and stationed at Lakeland Air Force Base in Texas. The local agent wrote to Young informing him that the policy had been received.

Fidelity Union's pre-authorized check drawn on Young's account in the Utica National Bank and Trust Company, Tulsa, Oklahoma for payment of the monthly premium due on October 18, 1974, was returned unpaid, marked "account closed." The local agent then sent a new pre-authorized check card to Young in Texas, and also advised Young's parents of the closed account and of his request that a new pre-authorized check card be completed. Instead of a new pre-authorized check card, the local agent received a check from the insured's mother, Charlotte Meier Young, the plaintiff and present appellant, dated November 18, 1974, in the amount of $30.05, payable to Fidelity Union. This payment was forwarded to Fidelity Union and deposited.

The local agent later forwarded the policy to Young at his mother's home address as he was unable to arrange a personal appointment with the insured who, as indicated, was then serving in the United States Air Force. The policy was received at the home of Young's parents in Kiefer, Oklahoma on or about December 15, 1974, and given to the insured by his mother on December 22, 1974. No further premium payments were made, and notices that the policy had lapsed and requests for a new pre-authorized check card were sent to the insured on January 3, 1975, and February 5, 1975. Young died on February 14, 1975.

The policy provided for a 30-day grace period which continued coverage for 31 days after a premium became due but was unpaid, and further provided, however, that the policy would be cancelled and forfeited if the premium due had not been paid by the end of the grace period.

It is the position of Fidelity Union that the effective date of the policy was September 16, 1974, the date on which Young made application with Fidelity Union for the issuance of an insurance policy, and that only two monthly premiums had been paid and received. Thus, according to the insurance company, the policy was in effect for only two months, plus the additional thirty-one day grace period, and that coverage had therefore lapsed on December 19, 1974, some 57 days prior to the insured's death on February 14, 1975.

It is the plaintiff's position that, under the provisions of the application, the insurance policy was not in force and effect until it was "manually delivered" to the insured on December 22, 1974. Therefore, according to the plaintiff, the two monthly premium payments, which were received by Fidelity Union, i.e., the one made by the insured on September 16, 1974, when he executed the application, and the second made by the insured's mother on November 18, 1974, provided for coverage for two months subsequent to the manual delivery of the policy on December 22, 1974. Under this approach, the policy of insurance would have been in force and effect on February 14, 1975, the date of the insured's death.

Where an insurance policy contains ambiguous or equivocal language, it should be interpreted favorably to the insured. Unigard Ins. Co. v. Studer, 536 F.2d 1337, 1339 (10th Cir. 1976). However, a court cannot resolve an ambiguity where none exists, and an unambiguous insurance constract, like any other contract, should be enforced as written. Hercules Cas. Ins. Co. v. Preferred Risk Ins. Co., 337 F.2d 1, 3 (10th Cir. 1964).

We find no ambiguity in the language appearing in the application relating to the effective date of the policy. The first sentence in the excerpt from the application set forth above provides that there shall be no liability until a policy has been issued and manually delivered to the

insured. The second sentence in that quotation, however, provides for a method whereby the insured may obtain immediate coverage. The second sentence provides, in essence, that the insurance shall be effective from the date of the application if the first premium is paid in full and the policy is issued exactly as applied for. The Conditional Receipt given the insured by the agent contained language substantially similar to the language in the application concerning immediate coverage.

In the instant case, Young paid the first month's premium on the same date that he executed the application. Such is a strong indication that the insured himself believed that he was covered as of that date. The policy which Fidelity Union issued two days later is, in our view, exactly what Young had applied for, i.e., life insurance in the amount of $20,000, with double indemnity provisions and a waiver of premium payments in case of disability.

It is plaintiff's contention that the policy issued by Fidelity Union was not *exactly* as applied for because of a premium differential. As indicated, the local agent had informed Young that the monthly premium was $30.06, and Young had given the agent a money order in that amount. The policy actually issued called for a monthly premium in the amount of $30.05. We deem this difference in premium between the application and the policy to be *de minimus*. Actually, if we understand it correctly, the one cent difference in the monthly premium is in favor of the insured. Also, the fact that the policy was dated September 18, 1974, does not constitute a variance from the application. In short, the policy issued was as applied for.

It is plaintiff's further suggestion that the language in the second sentence in the quotation from the application set forth above did not in any way obligate Fidelity Union to issue the policy applied for and was therefore illusory in nature. We do not agree. Under the terms of the ap-

plication, Fidelity Union was bound to issue the policy as applied for, assuming that certain stated conditions were met. In any event, this matter is somewhat academic, inasmuch as Fidelity Union did in fact issue the policy. Plaintiff is not seeking to disavow the contract and to obtain a return of the premiums paid. Rather, she is suing on the policy and is bound by the stated terms under which it was issued.

Based on the undisputed facts, the effective date of the insurance policy was September 16, 1974, and as only two monthly premiums were paid, the policy by its terms had lapsed when the insured met his untimely death on February 14, 1975. The trial court, under the circumstances, did not err in granting summary judgment for Fidelity Union.

Judgment affirmed.